No. 3513

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN MERCHANT MARINE INSURANCE COMPANY OF NEW YORK (a corporation),

Appellant,

vs.

H. G. TREMAINE, S. L. BUCKLEY and JOHN DOE BUCKLEY, doing business under the firm name and style of BUCKLEY-TREMAINE LUMBER COMPANY,

Appellees.

BRIEF FOR APPELLEE, H. G. TREMAINE

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In answer to the brief of appellant herein, and in support of the decree of the district court granting appellee's motion and dismissing appellant's first amended bill of complaint, we respectfully submit the following points and authorities:

I. IRRESPECTIVE OF THE PROVISIONS OF THE WASHINGTON STATUTE, THE AMENDED BILL OF COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A VALID CAUSE OF ACTION IN EQUITY AGAINST DEFENDANT, OR TO ENTITLE PLAINTIFF TO THE RELIEF SOUGHT.

(1) The bill of complaint fails to show that plaintiff has been or will be injured by reason of the omission from the insurance policy of the clause in question, or to show any need or reason for equitable relief.

It is essential to a cause of action in equity that there be some damage to the plaintiff, either suffered or threatened.

> "Courts of equity will not exercise their powers for the enforcement of right or prevention of wrong in the abstract and where no actual benefit is to be derived by the party who seeks to exercise such right, nor injury suffered by the wrong complained of."
>
> *Goodrich vs. Moore*, 72 Am. Dec. 75.
>
> 10 R. C. L., 369.

Although plaintiff's amended bill of complaint was filed herein on April 28th, 1920, (Tr. 31), almost seven months after the policy was issued, (Tr. 21) and almost six months after the expiration of the period during which it is alleged the vessel was to sail with the insured cargo, (Tr. 20) it does not show either that the vessel failed to sail within the required time, or that any loss has occurred or may occur, on account of which plaintiff has been or may be injured. Plaintiff has failed to show, either that it would be benefited by the granting of the relief prayed for, or that it would be injured without such relief. It asks a court of equity to reform a contract without any showing whatever that it has suffered or will suffer any loss or damage on account of such contract in its pres-

ent form. It is thus presenting for determination a purely speculative and abstract proposition, which a court of equity will not entertain.

It is alleged in the complaint (Tr. 20) that the terms of the contract entered into on October 3rd, 1919, between plaintiff and defendants provided that the scow, carrying the insured cargo, should sail during the month of October; but it is nowhere alleged, and there is nothing in the complaint to show, that the scow did not sail during that month, and certainly there is no presumption that it did not. If the contract provided for October sailing, as the complaint alleges, then, in the absence of any statement or showing to the contrary, it must be presumed that defendants complied with the terms of that contract and that the scow did sail in October. And if the scow with the insured cargo actually sailed in October, in compliance with the alleged terms of the contract, then it necessarily follows that plaintiff could not be injured by the mere fact that such provision for October sailing had been omitted from the policy, even if such provision were intended to be inserted therein as a warranty. Plaintiff has therefore failed to show wherein it is injured by this omission from the policy or to show any equitable reason why the policy should be reformed as prayed for.

Furthermore, the bill of complaint does not state or show that any loss has occurred, or may occur, with respect to the insured cargo, or that plaintiff has been or may be required to pay any sum or

discharge any obligation whatever on account of the policy of insurance in question. If no loss has occurred or may occur, then there could be no damage to plaintiff by reason of the omission from the policy of the provision for October sailing. If, for instance, the vessel has arrived safely, the policy is terminated, and a reformation of it is a futile thing. Plaintiff fails to show either that a loss has occurred or that the voyage has not yet terminated and that a loss may occur.

There is, of course, no presumption that loss has occurred. If there be any presumption it would be to the contrary. And in this connection the court will consider the fact that plaintiff's amended bill of complaint was filed, as above stated, nearly seven months after the date of issuance of the policy in question, and almost six months after the expiration of the period during which it is alleged the scow should sail, and yet it does not contain one word to indicate that any loss has occurred—that the voyage has not been safely completed. After such a lapse of time, this silence certainly tends strongly to create or corroborate the presumption that no loss has occurred and that the voyage has been safely completed. Certainly, in the face of this, plaintiff can not expect a court of equity to indulge in any presumption that a loss has occurred or may occur, in order to supply to its complaint an essential element of its right to the equitable relief sought.

(2) The bill of complaint does not sufficiently show whether the phrase "Oct. Slg." appearing in the application was intended by both parties to be a warranty, or a representation, and, if the latter, that it was material.

To make the facts stated in a bill of complaint sufficient to authorize a court of equity to reform a contract by inserting *somewhere* therein certain words, intended by both parties to be inserted, but omitted by mistake, it must affirmatively appear that the minds of the parties met as to the connection and relation in which the words were to be used—as to the *legal significance and force* they should have when inserted; or, in other words, that the minds of the parties met upon the *same thing in the same sense.*

Plaintiff in this action seeks to have a policy of insurance reformed, in accordance with what it alleges was the actual intention of the parties, by inserting therein the words "October sailing," which words, it alleges, appeared in the application for the insurance (Tr. 19, 20) and were intended by the parties to be included in the policy, but were omitted by mistake (Tr. 21). Plaintiff does not state what kind of term or obligation of the policy it was intended by the parties that these words should express, whether a representation or a warranty. It is not enough to say that these words should be in the policy; their intended force and significance therein must be shown, and it also must be clearly shown that the purpose indicated was the exact purpose and significance that both parties

intended. Plaintiff in its bill of complaint has not only failed to indicate definitely in what particular legal sense these words should be embodied in the policy, but it has failed to show that this particular legal sense was actually intended by both parties.

The importance of definitely showing the intended character of these words in the insurance policy is all the more appreciated when we consider the essential difference, in nature and legal effect, between a provision in a policy of insurance constituting a warranty and that which constitutes a representation. A warranty is in effect a condition precedent to the validity of the policy, and if not strictly adhered to avoids the policy; and this is true whether or not the thing warranted is in fact material to the risk. If it has been agreed upon by the parties as a warranty its materiality is conclusively presumed on account of such agreement. Moreover, to constitute a warranty, the provision must appear in the policy.

> *Joyce on Insurance* (2nd ed.) secs. 1882, 1951, 1962.

A representation, on the other hand, does not affect the validity of the policy unless it be actually material to the risk or has induced the insurer to accept the risk.

> *Joyce on Insurance* (2nd ed.) secs. 1882, 1892-3.

If plaintiff in this action seeks to show that the words "October sailing" were intended as a war-

ranty, then it must definitely so allege. This it has failed to do. The only allegations in the complaint which at all relate to the nature of this phrase are those contained in paragraphs III and VIII (Tr. 19, 22). In paragraph III plaintiff merely alleges (Tr. 19, 20) that defendants made an application in writing for insurance, which plaintiff accepted. This application is then set forth in Exhibit "A" (Tr. 24). It contains the words, "Oct. slg."; but nothing appears thereon to indicate that such words were intended as warranty, and plaintiff does not allege that it was so intended by both parties. Certainly the mere fact that such statement appears in the application does not make it a warranty. There is not only no such presumption, but the contrary presumption is well established.

In the first place a statement in an application can not in any event become a warranty, unless and until it is incorporated in the insurance policy. This rule is an absolute and unfailing one.

Joyce on Insurance (2nd ed.) sec. 1949.

In the second place, a statement, even when contained in the policy, will be presumed or construed to be a representation rather than a warranty in every case unless the intention to make it a warranty clearly appears. Warranties are not favored by construction.

Joyce on Insurance (2nd ed.) secs. 1949-50.

Moulor vs. Insurance Co., 28 U. S. (L. ed.) 449.

Plaintiff in paragraph VIII (Tr. 22) alleges that "said omitted provision constituted a material express warranty by defendants materially and substantially affecting the rights and obligations of plaintiff." But this is a mere statement of a legal conclusion. It is not equivalent to, and does not dispense with the necessity of a statement of facts showing that it was agreed and intended by both parties that such provision should be a warranty. Plaintiff's allegations, therefore, utterly fail to show a mutual intention and agreement that this provision should constitute a warranty.

If, on the other hand, plaintiff seeks to have the provision for October sailing inserted in the policy as a representation, then it must show that such provision is either material to the risk, or induced plaintiff to accept the risk. For, if this provision is merely a representation which has no material bearing on the risk and did not induce plaintiff to accept the risk, then no reason exists for seeking the aid of a court of equity to insert it in the policy. It is incumbent upon plaintiff to show by definite allegations of fact, either that the risk was less upon a vessel sailing in October than upon one sailing at a subsequent time; that the rate of premium was less, or that without such a representation plaintiff would not have accepted the risk. The bill of complaint is entirely lacking in such allegation.

Joyce on Insurance (2nd ed.) sec 1892.

The only allegation whatever in the complaint

relating to the materiality of this provision for October sailing is the broad, general statement, above quoted, to the effect that the omitted provision materially and substantially affects the rights and obligations of plaintiff. This statement is not only a mere conclusion, but fails to even indicate how or in what manner its rights and obligations are affected. Before a court of equity will reform a contract by inserting therein a provision alleged to have been omitted by mistake, it must be shown in what manner and for what reason the party seeking such reformation has been or will be injured by the omission. If the omitted provision is immaterial and of no consequence, a court of equity will not exercise its powers to perform the useless function of inserting it in the policy. Plaintiff has totally failed to show the materiality of this omitted provision and the relief prayed for should be denied.

(3) The amended bill of complaint does not contain a sufficient allegation as to the existence of a mutual mistake to entitle plaintiff to reformation of the policy.

It is a fundamental rule of pleading, whether at law or in equity, that facts must be stated and not mere conclusions. It is also a well-established rule that the facts must be definitely stated. Especially is this true where fraud or mistake is alleged. The fraud or mistake must be stated with particularity.

> "It is elementary that a complainant in equity must allege with particularity every material fact necessary for him to prove to establish his right to the relief prayed."

Wilson vs. Ice Company, 206 Fed. 738.

Story's Equity Pleading, sec. 241.

Equity Rule 25.

Montgomery's Federal Procedure (2nd ed.) 319.

The amended bill of complaint in this case not only fails to state with definiteness and particularity facts showing the existence of a mutual mistake, but it alleges instead of facts mere speculations or conclusions, and even these are conflicting and inconsistent.

The only allegation in the complaint with reference to any mistake on the part of defendants is that contained in paragraph VII (Tr. 22). Plaintiff there alleges:

"* * plaintiff is informed and believes * * the defendants * * *believing* that the *said certificates did in fact contain the said omitted provision* * * * by accident and mistake accepted the said certificate * * *or* the defendants, *knowing that the said omitted provision was in fact not incorporated* in the said certificate and that the same was omitted therefrom by accident and mistake * * *neglected to disclose the fact* of such omission to the plaintiff."

It will be noted that while plaintiff alleges on information and belief that defendant accepted the policy by accident and mistake *believing that it contained the omitted provision* and not knowing that

it had been omitted, this statement is coupled with a directly refuting statement that defendant *did know the provision had been omitted* but fraudulently concealed its knowledge from plaintiff. Plaintiff in the same breath alleges good faith and bad faith on the part of defendants respecting the same transaction. It is thus apparent that plaintiff has not alleged the facts according to its knowledge, information or belief, but, having neither any knowledge, information or belief as to what the facts are, has indulged in speculation as to what they might be, and, as a result of such speculation, has alleged as facts the two alternative and inconsistent conclusions mentioned.

If under any circumstances it be permissible to base a cause of action such as this upon a mere conclusion, which we do not at all concede, it could only be in a case where the conclusion alleged constituted the only possible deduction from the facts stated. Any such justification is lacking in this case, for the reason that, in addition to the two conclusions asserted by plaintiff, there is a third, which, we submit, is far more logical and reasonable in view of the facts and circumstances stated in the complaint, and is more consistent with honesty and fair dealing, namely this: That defendants examined the policy when delivered to them, and noticed that the provision for October sailing had been omitted, but, knowing that the policy had been prepared by plaintiff, naturally and reasonably assumed that the omission was intentional and deliberate, and

that plaintiff had considered the provision immaterial; which assumption is in accordance with the general rule of law referred to in another part of this brief. This conclusion does not involve any assumption of mistake or of fraud, and is entirely consistent with the transactions leading to the issuance of the policy. If conclusions are to be considered in determining the rights of the parties in this action, then we submit that this third conclusion is the most logical one, and necessarily precludes the relief sought by plaintiff.

We insist, however, that the rules of pleading should govern, and that according to such rules plaintiff's bill of complaint is fatally defective, in that it has failed to allege definitely and with particularity facts sufficient to show any mutual mistake with respect to the terms of the policy.

(4) Plaintiff is not entitled to the relief sought for the reason that its bill of complaint shows that it has been guilty of laches in bringing this action and that defendant has been prejudiced thereby.

It is a well settled rule of equity that an equitable remedy to which a party might otherwise be entitled will be denied to him whenever it appears that he has so long delayed the enforcement of his rights that the situation of the other party has been changed to his prejudice and the granting of the remedy would work an injustice upon such other party.

Pomeroy's Equity Jurisprudence (3d ed.) secs. 424, 897, 917.

Pomeroy's Equitable Remedies, sec. 21.

It is also incumbent upon a plaintiff seeking relief in equity to state facts showing that he has not been guilty of delay to the prejudice of defendant; and in cases where mistake or fraud is alleged, he must definitely state when and how he obtained knowledge thereof, why it was not obtained earlier, and the degree of diligence exercised by him to discover the mistake or fraud. Otherwise his bill will be dismissed.

Pomeroy's Equitable Remedies, secs. 21, 36.

Hubbard vs. Manhattan Trust Co., 87 Fed. 51 (59).

Cutter vs. Water Co., 128 Fed. 505 (509).

Wood vs. Carpenter, 25 U. S. (L. ed.) 807.

Hardt vs. Heidweyer, 38 U. S. (L. ed.) 548 (552).

Plaintiff in its bill of complaint alleges that the policy in question was executed and delivered to defendants on October 6, 1919 (Tr. 21). It also alleges that according to the terms of the application for the insurance the scow carrying the insured cargo was to sail during the month of October (Tr. 19, 20). It states that a mistake was made by it in omitting the provision for October sailing from the policy (Tr. 21), but makes no statement whatever as to when or in what manner it first discov-

ered that the mistake had been made; neither does it state what degree of diligence it exercised to discover any mistake. It does not show that the mistake was not discovered by it until after the vessel carrying the insured cargo had sailed. If plaintiff discovered the alleged mistake at any time during the month of October, and before the vessel had sailed, and it intended to insist upon the provision for October sailing as an essential condition of the insurance, then as a matter of equity and fair dealing it owed a duty to defendants to seek such modification of the policy before the month of October expired, in order that defendants might not be misled by the silence and inaction of plaintiff into believing that they were protected by the policy of insurance delivered to them, the terms of which did not restrict the time of sailing to the month of October.

The necessity for prompt action to correct a mistake is especially applicable to a case like this one, where a policy of insurance is involved and plaintiff seeks to have it reformed to agree with the terms of the application, because of the strong presumption of law that a policy of insurance when issued supersedes the application and all prior agreements, and that any provision of the application inconsistent with or omitted from the policy is deemed to have been waived.

U. S. Cas. Co. vs. Charleston Co., 183 Fed. 238.

El Dia Ins. Co. vs. Sinclair, 228 Fed. 833.

Andrews vs. Ins. Co., Fed. Cas. 374.

Union Mutual Ins. Co. vs. Mowry, 24 U. S. (L. ed.) 674.

American Popular Life Ins. Co. vs. Day, 23 Am. Rep. 198.

The case of *Andrews vs. Insurance Company*, above cited, was a case, like the one at bar, where plaintiff sought to have a policy of marine insurance reformed to agree with the terms of the application, by inserting therein a clause relating to the voyage, which it was alleged had been contained in the application but omitted by mistake from the policy. The case was brought in a court of admiralty, and was dismissed for the reason that an admiralty court had no jurisdiction to entertain such a suit. The court, however, referred to the necessity of extreme caution in granting reformation in such cases, using the following language, which is so peculiarly applicable to the case at bar that we invite the court's attention to it:

> "It is not pretended that every thing contained in the memorandum was to be inserted in the policy. It is perfectly notorious that proposals of this nature often contain remarks, representations, and queries, for the information and guidance of the underwriters which cannot by any reasonable construction be supposed proper for insertion in the policy. In many instances the insertion would be absurd, and in some might be repugnant

> to the obvious intent of the parties in their final act. * * * It is not sufficient therefore to show that a clause is in the momorandum, to justify its insertion in the policy, unless from its nature and object it clearly formed a part of the contract. A clause may in the event become material and decisive of a right if inserted, which may nevertheless, at the time of the proposal, not have been contemplated by either party as a part of the policy. It might make all the difference between a representation and a warranty, a difference in many cases of the most serious importance."

We would call attention to the fact that this presumption above mentioned obtains irrespective of the provision of any statute, such as exists in the State of Washington. We shall, hereafter, refer to that statute and its effect upon this case.

II. PLAINTIFF'S VIOLATION OF THE PROVISIONS OF THE WASHNIGTON STATUTE PRECLUDES ITS RIGHT TO THE RELIEF SOUGHT.

The maxim of equity that he who comes into equity must come with clean hands requires a denial of equitable relief to one who has violated the law.

Plaintiff's amended bill of complaint states that it is a foreign corporation, and is "duly authorized to do business in the State of Washington by virtue of strict compliance with the laws of said State" (Tr. 18). One of the laws of the State of Washington governing such insurance companies is that

contained in Sections 6059-31 of Remington's Code, which provides as follows:

> "Every contract of insurance shall be construed according to the terms and conditions of the policy, except where the contract is made pursuant to a written application therefor, and such written application is intended to be made a part of the insurance contract, and the insurance company making such insurance contract, unless as otherwise provided by this act, shall deliver a copy of such application with the policy to the assured, and thereupon such application shall become a part of the insurance contract, and failing so to do it shall not be made a part of the insurance contract."

Attention is directed to the fact that this section absolutely requires that *"the insurance company * * shall deliver a copy of such application with the policy to the assured * ** and *failing to do so, it shall not be made a part of the insurance contract.* From the bill of complaint it plainly appears that plainiiff did not deliver a copy of the application in question with the policy. Yet, having absolutely violated this positive requirement of the statute, plaintiff now comes into a court of equity asking that a provision of this application be made part of the insurance contract. As a violator of the law it does not come into this court with clean hands, and the relief it seeks should be denied.

Plaintiff argues that this statute prescribes merely a rule of evidence, and for that reason it can not have any effect in a federal equity suit, and can

not apply to a suit for reformation of an insurance policy. On page 8 of plaintiff's brief, counsel makes the statement that the Washington statute is merely "a legislative extension of the parol evidence rule," but he cites no authority in support of this extraordinary statement. We say this statement is extraordinary, because nothing whatever is said in the statute about proof or evidence; but the statute in clear and definite terms imposes a duty or obligation upon insurance companies, namely, to deliver to the assured a copy of any application which is intended to be made a part of the insurance contract, and in case of failure so to do, excludes therefrom any and all provisions of the application.

The purpose of such laws, as stated in various decisions of the courts, is to require the entire insurance contract to be placed in the hands of the assured, that he may know what the exact terms of the completed contract are; and to place upon the insurance company the obligation of either including in such delivered contract all the terms it deems essential or be held to have waived such as are not included.

Rauen vs. Insurance Co., 106 N. W. 198 (Iowa).

Provident Co. vs. Puryear, 59 S. W. 15 (Kentucky.)

Failure of an insurance company to comply with the provisions of such a statute has been held to preclude its obtaining in a court of equity the can-

cellation of an insurance policy for fraud in its procurement.

New York Life Ins. Co. vs. Hamburger, 140 N. W. 510 (Michigan.)

This last mentioned case as well as those above cited amply support the decision of the district court in dismissing plaintiff's bill of complaint.

III. AS TO APPELLANT'S CLAIM OF THE UNCONSTITUTIONALITY OF THE WASHINGTON STATUTE AS APPLIED TO THIS CASE.

Counsel contends that the statute of Washington, prescribing the form of contracts of marine insurance, does not apply to this case on the ground that, so to apply it, would tend to disturb the uniformity of the admiralty jurisdiction throughout the United States; and, to sustain this contention, he cites the case of *Union Fish Company vs. Erickson*, 248 U. S. 308, in which the court sustained a libel in admiralty brought by Erickson in a United States district court of California to recover damages from the owner of a vessel for breach of an oral contract for its use upon the seas in a commercial adventure, which contract was not to be performed within a year, and, such being the case, was, under the California statute of frauds, required to be in writing.

The fallacy of counsel's contention and the inapplicability of the *Erickson* case can be readily disclosed by the consideration of these facts:

Erickson was in a court of admiralty seeking an admiralty remedy for a breach of a maritime right; this appellant is here in a court of equity, seeking an equitable remedy for the enforcement of an equitable right.

The doctrine of the necessity of uniformity of admiralty jurisdiction and of admiralty rights throughout the United States, is not pertinent to the case of a suitor who invokes the jurisdiction of a court of *equity* to establish a merely *equitable* right. The very reason appellant has come into a court of equity is because the subject matter of its suit is not of a maritime character. That it is not of that character is established in the case of *Andrews vs. Essex Fire & Ins. Co.*, 1 Fed. Cas. No. 374, p. 885, which was an action in admiralty seeking reformation of a policy of marine insurance by inserting therein a clause specifying the voyage, which clause had been contained in the memorandum for the insurance, but, as was alleged, omitted from the policy through mistake. In the course of its opinion, the court said:

> "Courts of admiralty, in my view, have jurisdiction over maritime contracts WHEN EXECUTED, but not over contracts leading to the execution of maritime contracts * * * If the contract be an executed maritime contract, the jurisdiction attaches; and the admiralty may then administer relief upon that contract according to equity and good conscience. The law looks to the proximate and not to the remote cause as a source of jurisdiction, and deals with it only when it has as-

> sumed its final shape as a maritime contract. It has been said that the memorandum in the present case is an executed maritime contract, equivalent to a policy; but I understand it to be *nothing more than an agreement for a policy;* and if no policy had been executed, this court, as a court of admiralty, would not have had jurisdiction to enforce it."

The doctrine of the above case has been followed in the following cases, to-wit:

Williams vs. Ins. Co., 56 Fed. 159.

United T. & L. Co., vs. N. Y. & B. T. Line, 185 Fed. 386.

Rea. vs. "Eclipse," 34 U. S. (L.ed) 269.

In the *Erickson* case, the libelant was suing upon an executed maritime contract, claiming damages on account of the wrongful interruption by respondent of a marine adventure. In this action, appellant is asking to have a *certain piece of paper*, purporting to contain the terms of a contract of marine insurance, brought into court and the language thereof changed by the insertion of certain words. Such a suit relates merely to the *making* of a maritime contract and not to the enforcement of one. The making of such a contract, whether solely by the manual acts of the parties, or partly by such acts and partly by the interposition of a court of equity, is purely a land transaction, as much so as the making of a deed of land or of a bill of sale of personal property, or of a policy of insurance on a brick block.

It is true that, in making a contract of marine insurance, the parties contemplate a future marine adventure. So, also, do the parties to a contract for the building of a ship; but no one would contend that a suit for the reformation of a contract to build a ship lies in the field of admiralty law either substantive or adjective, or that it was not competent for the state in which the ship was to be built to prescribe the form of a ship building contract, or to define the rights of the parties thereto in case such form was departed from in any specified particular on the ground that to do so would disturb the uniformity of our admiralty system.

While the above is a conclusive answer to counsel's contention, it is also well to note the following distinctions between the *Erickson* case and this case:

1. In the court's opinion in the *Erickson* case occurs this language:

> "In intering into this contract, the parties contemplated no service in California. They were making an engagement for the services of the master of the vessel, the duties *to be performed in the waters of Alaska, namely, upon the sea.* The maritime law controlled in this respect and was not subject to limitations because the engagement happened to be made in California."

The insurance policy before the court was not only made in the state of Washington, but was to

be performed in that state, as is indicated by this language:

"Loss, if any, payable to the order of assured in Seattle, Washington."

We thus have a contract made in Seattle, Washington, *and to be performed in Seattle, Washington.*

2. Besides, as we have before stated, the first amended complaint, alleges that appellant is a corporation of the state of New York, and was at all of the times mentioned in the bill, duly authorized to do business in the state of Washington by virtue of strict compliance with the laws of that state governing such foreign corporations. Appellant had no right to do business in the state of Washington, except upon the conditions prescribed by the legislature of that state; and when appellant entered the state of Washington for the purpose of writing insurance therein, it agreed to comply with the statutes of that state relating thereto, and, among other things, agreed that, whenever it issued a policy of insurance, it would deliver therewith a copy of the application, and, also that, if it failed so to do, such application would be considered no part of the insurance contract. Even if appellant had been a natural person and a resident of the state of Washington, writing such a contract, and as such, had been exempt from the application of the statute on the constitutional grounds expounded by counsel, yet there is no rea-

son why, being as it in fact is and was, a foreign corporation entitled to write insurance only on the conditions prescribed by the state law, it could not, in consideration of a license to do business in the state, waive those constitutional admiralty rights and agree to be governed in the matter of writing policies of marine insurance by state laws in conflict therewith.

IV. EVEN HAD THE BILL OF COMPLAINT BEEN SUFFICIENT IN OTHER RESPECTS TO ENTITLE PLAINTIFF TO THE RELIEF SOUGHT, IT WAS PROPERLY DISMISSED BECAUSE PLAINTIFF'S FAILURE TO BRING ALL THE ESSENTIAL PARTIES BEFORE THE COURT RENDERS IMPOSSIBLE THE GRANTING OF ANY RELIEF.

The amended bill of complaint shows (Tr. 18) that this action is against three defendants, namely, "H. G. Tremaine, * * S. L. Buckley, and John Doe Buckley," who are co-partners constituting the firm of Buckley-Tremaine Lumber Company, and is for the purpose of reforming a policy of insurance, set forth in Exhibit "B" (Tr. 25), which was issued in favor of said defendants and delivered to them on October 6, 1919. (Tr. 21). The complaint therefore clearly shows that the policy sought to be reformed is the contract and property of the three defendants named.

The records also shows that only one of these above defendants, H. G. Tremaine, has been served or made any appearance herein. (Tr. 13). The

record fails to show why the other defendants have not been served, or whether plaintiff ever expects to obtain service upon them. When the motion to dismiss was heard on April 26th, 1920, (Tr. 16) the original bill of complaint had been served upon defendant Tremaine only, (Tr. 13) yet no continuance was asked on that account, nor was the lack of such service at all referred to; and when the hearing was had on the motion to dismiss the amended bill of complaint, on May 3, 1920, (Tr. 33) still no service had been made upon the other defendants, and no continuance was asked on that account, or any reference made to that fact by plaintiff. While counsel make the assertion on page 3 of their brief that "up to the time when the decree was rendered, it proved impossible to obtain personal service upon the other two defendants," there is nothing whatever in the record to justify this statement.

At the hearing upon the motion to dismiss the amended bill, appellant should, if it expected to obtain service on the other defendants, have asked the court to defer action on the motion until such service was obtained; and if it was found impossible to obtain such service the bill was subject to dismissal for that reason alone. But, instead of asking for time to complete service, or making any other counter application, appellant refused to plead further and stood uncompromisingly on the record as it then was. (Tr. 37).

It is obvious that the relief sought, which in-

volves the surrender for correction of a policy of insurance, cannot possibly be granted where the policy in question is the property of and in the possession of three persons, only one of whom is before the court and amenable to its decree.

To allow plaintiff the relief prayed for, in view of the circumstances stated, must either result in a decree which can bind only one of three essential parties and can never be enforced,—a futile act which equity abhors—, or in permitting plaintiff to prosecute its suit against each of three essential parties separately, or piece-meal, thus multiplying litigation, a thing equally opposed to the principles of equity.

It is a settled rule in equity, which should be applied in this case, that if all the necessary parties are not before the court, either by service of process or by voluntary appearance, and the interests of those present and those absent are inseparable, the bill must be dismissed.

20 Ruling Case Law, 704, and cases cited.

Mallow vs. Hinde, 6 U. S. (L.ed.) 599 (600).

Barney vs. Baltimore, 18 U. S. (L.ed.) 825 (826).

The Matter of Change of Voyage Covered by Adjustment of Premium.

The policy contains this provision:

"Held covered at a premium to be arranged, in case of *deviation or change of voyage* or

> of any error or unintentional omission in the description of the interest, vessel or *voyage*, provided same be communicated to the insurrer as soon as known to the assured."

Nothing is alleged in the amended bill to show why the above provision could not have been applied to the present case.

In view of the general rule of the law that any provision in an application for insurance which has been omitted from the policy is presumed to have been considered immaterial or to have been waived, and, also, of the stringent provisions of the Washington statute now before the court, designed to prevent such controversies as this and also *particularly* unconscionable defenses by insurance companies, do the allegations of the amended bill, especially considering their lack of candor, definiteness and certainty, appeal to the conscience of the court as sufficient to entitle appellant to any relief?

Respectfully submitted,

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